IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 317

HANS LUDWIG BENZIAN,

Petitioner,

v.

SAUL GODWIN, Chairman, and IRVING J. HESS, LEONARD E. SCHWALBE, IRVING SABSEVITZ and CLIFFORD N. OWEN, Members, of Local Board No. 65, Manhattan, City and State of New York, United States Selective Service System,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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SAUL GODWIN, Chairman, and IRVING J. HESS, LEONARD E. SCHWALBE, IRVING SABSEVITZ and CLIFFORD N. OWEN, Members, of Local Board No. 65, Manhattan, City and State of New York, United States Selective Service System,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The petitioner herein respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered June 30, 1948 (R. 69), affirming the judgment of the United States District Court for the Southern District of New York (R. 51).

The opinion of the Circuit Court of Appeals is reported at 168 F. (2d) 952.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 United States Code, Section 347(a)).

This action was commenced on March 27, 1947 in the District Court, Southern District of New York. After answer, upon a stipulation which removed all genuine issues of material fact from the case, cross-motions for summary judgment were made and heard, and on January 13, 1948 the District Court, in a written opinion (R. 43-50) granted respondents' motion, denied petitioner's cross-motion, and on January 19, 1948 entered a final order and judgment dismissing the action on the merits (R. 51).

Appeal was taken to the Court of Appeals for the Second Circuit on March 13, 1948, and on June 30, 1948 the Court filed its opinion affirming the judgment below (R. 59-68).

Summary Statement of the Matter Involved

The essential facts are undisputed. Petitioner is a citizen of Sweden domiciled in Stockholm, and a partner in Erik Lindblom & Company, a Stockholm chemical and pharmaceutical import-export company (R. 3, 4).

In late fall of 1939, after the outbreak of World War II, petitioner's firm decided to open a New York purchasing agency for raw chemicals and pharmaceutical products needed by their customers in the Allied countries. Petitioner, upon previous call for military service with the Swedish Army had, after physical examination, been certified as totally unfit for Swedish military service because of chronic rheumatic fever. He was therefore chosen as the member of the firm to make this business trip (R. 4, 22, 30, Exhibits 1 and 2).

For that purpose, petitioner applied to the United States Consul in Stockholm for business-visitor permits for himself and his wife, stating that the trip would require three to four months, at the conclusion of which he must return to Stockholm (R. 5). The Consul, in January, 1940, issued the requested business-visitor permits, valid for six months. On January 28, 1940, he and his wife arrived at the Port of New York and were admitted as non-resident, temporary visitors, pursuant to Section 3(2) of the Immigration Act of 1924, for the usual period of six months (R. 5), the permit being stamped into their passports (R. 32).

Petitioner had previously purchased return passage tickets aboard S. S. Drottningholm, Swedish-American Line, scheduled to depart from New York on July 8, 1940 (R. 32).

In February, 1940, only a few weeks after petitioner's arrival, Germany invaded Norway (R. 6). This event cut off all non-priority, civilian, steamship and air travel into Sweden from countries outside the German orbit. The Swedish-American Line advised petitioner that his return passage (Exhibit 4) was suspended for an indefinite period (R. 6, 33). In July, 1940, after making other futile efforts to find transportation, he applied to the United States Immigration and Naturalization Service for an extension of temporary stay, citing the physical unavailability of return transportation to Sweden. After investigation, the Service granted a six months' extension to both petitioner and his wife. At successive periods of six months' intervals thereafter, after investigation, additional extensions of their permits to the present day were granted. Since January 1942, they have been granted, as required by law, by the Central Office of the Service (R. 7, 34).

Each year from 1942 through 1946, while a temporary visitor in the United States, petitioner paid Federal and State income taxes as a non-resident, in accordance with Treasury Department Regulations defining such alien tem-

porary visitors as non-residents, and paid the higher taxes assessed in this category (R. 7).

On September 16, 1940, the Selective Training and Service Act became law, and on October 16, 1940, petitioner registered at Local Board No. 65, Manhattan, New York City, reading the regulations to mean that all aliens, regardless of status, were required to register (R. 8, 35). In registering, he set forth his Swedish citizenship and his visitor's status in the United States, and subsequently, on January 14, 1941, he filed a Selective Service Questionnaire, repeating and setting forth in full his Swedish citizenship, and explicitly stating: "As a temporary visitor in this country, I think I am deferred from military service by law" (R. 27, Exhibit A). The Local Board, however, on February 26, 1941, placed him in Class III (deferred by reason of dependency) (R. 8, 9, 35).

On October 30, 1943, Local Board No. 65 summoned petitioner for a hearing in connection with his classification (R. 8, 35). At the hearing, petitioner was asked if he intended to become a United States citizen. He replied that he did not, but that on the contrary, he was a business visitor from Sweden and intended to return to Sweden as soon as transportation became available (R. 35, Exhibit C). After showing the Board his Swedish passport and the visitor's permit issued by the Immigration Service, and pointing out that his present visitor's permit expired within a few months (R. 35), petitioner then requested permission to file Form 302 (application by an alien for determination that he is not a "male person residing in the United States"), pursuant to the Selective Service Regulations. This request the Board denied, advising him that his time to do so had expired, under Selective Service Regulation 611.21, three months after registration. He was instructed that his only alternative to induction was to assert his privilege as a citizen of a neutral country, by filing Form 301, which would exempt him from military service

for the United States, but that such action would render him ineligible thereafter from becoming a citizen of the United States. He was instructed to consider the matter of filing Form 301 and to report back to the Board with his decision at the end of a week (R. 35, Exhibit C).

On November 8, 1943, petitioner returned to the Board for a supplementary hearing, and respectfully informed its members that as he had come to this country solely as a non-resident business visitor, the war alone preventing his return to Sweden, he found it hard to believe that he was subject to United States military service. The Board nevertheless directed that he decide between classification into 1A, which meant immediate induction and consequent loss of his Swedish citizenship (R. 36-37), and the signing of Form 301, which would render him ineligible for American citizenship. Petitioner executed Form 301. The Board thereupon placed him in Class 4C (deferred because of asserted neutral status) (R. 37, Exhibit D).

In late summer 1945, transportation facilities between the United States and Sweden were reestablished (R. 37). Although he had made periodic efforts during the preceding five years to return to Sweden, (having continually retained his return-trip steamship tickets), by 1945 petitioner and his wife had two American-born minor children, aged four and one (R. 37, 38). He and his wife had learned English, and had acquired an understanding and admiration for American traditions. His business, which had furnished medical supplies to the Allied countries, had grown into a substantial concern (R. 38). He and his wife therefore decided that they should like to remain in this country for permanent residence, in order to bring up their children here (R. 38).

Petitioner therefore applied to the Immigration and Naturalization Service for pre-examination, in order to effect re-entry through Canada as a permanent resident.

In March, 1946 the Commissioner of Immigration and Naturalization denied his application on the sole ground that his execution of Selective Service Form 301 had rendered him ineligible for citizenship and hence inadmissible to this country for permanent residence under the provisions of Title 8 United States Code § 213(c) (R. 38-39).

On June 1, 1946, Local Board No. 65 notified petitioner that his case had been reopened, directing him to submit any additional evidence bearing upon his classification. In response, petitioner filed an application for determination of residence in accordance with the new Regulation 611.21-1 (added June 27, 1945, and permitting the filing of Form 302 after the three-month period). No decision was ever made by the Board on this application for determination of residence. Petitioner was merely notified that he had been reclassified into Class 3A (deferred because of dependency). On October 1, 1946, he addressed a letter to the Board requesting information as to the determination of his residence. Receiving no answer (R. 39), he subsequently, on December 16, 1946, applied through the Local Board to the Director of Selective Service for cancellation of his registration, on the ground that the Act was not applicable to a temporary visitor. On February 17, 1947, the Director denied his application; but altho notifying the Local Board the following day that petitioner had been determined "a male person residing in the United States", petitioner never was advised of this determination (R. 39-40).

On March 27, 1947, petitioner instituted the present action against Local Board No. 65, seeking judgment declaring (a) that his execution of Form 301 was a nullity; (b) that he is today eligible for U. S. citizenship; and (c) that he is therefore not inadmissible for permanent residence.

Statutes Involved

The pertinent provisions of the Selective Service Act of 1940, as originally enacted, are as follows:

Section 2 read:

> "Except as otherwise provided in this Act, it shall be the duty of every male citizen of the United States, and of *every male alien residing in the United States* . . . between the ages of twenty-one and thirty-six, to . . . submit to registration . . .". (Italics added.)

Section 3(a) read:

> "Except as otherwise provided in this Act, every male citizen of the United States, *and every male alien residing in the United States who has declared his intention to become such a citizen*, between the ages of twenty-one and thirty-six at the time fixed for his registration, shall be liable for training and service in the land or naval forces of the United States." 54 Stat. 885 (Sept. 16, 1940) (50 U. S. C. App. Sec. 303). (Italics added.)

Sections 2 and 3(a) were amended during the week after Pearl Harbor, by Act of December 20, 1941, to read:

> "2. . . . it shall be the duty of every male citizen of the United States, and of every other male person residing in the United States . . . between the ages of eighteen and sixty-five to . . . submit to registration . . . ."
>
> "3(a) Except as otherwise provided in this Act, *every male citizen in the United States, and every other male person residing in the United States*, who is between the ages of eighteen and forty-five . . . shall be liable for training and service . . . ." 55 Stat. 845, 846, Ch. 602. (Italics added.)

The section further stated:

> "Provided, that any citizen or subject of a neutral country shall be relieved from liability for train-

ing and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States."

Section 5(a) of the Act, listing exemptions and deferments, includes the following:

". . . *and persons in other categories to be specified by the President,* residing in the United States, who are not citizens of the United States and who have not declared their intention to become citizens of the United States, shall not be required to be registered under Section 2 and shall be relieved from liability for training and service under Section 3(b)." (50 U. S. C. App. Sec. 305(a).) (Italics added.)

Selective Service Regulations Involved

"Section 611—Aliens Residing in the United States.

• • • • • • •

"611.12 *When a non-declarant alien is residing in the United States.* Every male alien who is now in or hereafter enters the United States who has not declared his intention to become a citizen of the United States, unless he is in one of the categories specifically excepted by the provisions of Section 611.13 is 'a male person residing in the United States' within the meaning of Section 2 and Section 3 of the Selective Training and Service Act of 1940, as amended. (Effective Feb. 7, 1942; Revoked March 15, 1945.)

"611.13 *When a non-declarant alien is not residing in the United States.* A male alien who is now in or hereafter enters the United States who has not declared his intention to become a citizen of

the United States is not 'a male person residing in the United States' within the meaning of Section 2 or Section 3 of the Selective Training and Service Act of 1940, as amended; provided he has in his personal possession an official document issued pursuant to authorization of or described by the Director of Selective Service which identifies him as a person not required to present himself for and submit to registration, and provided:

* * * * * * *

". . . (6) He has entered or hereafter enters the United States in a manner prescribed by its laws and does not remain in the United States after May 16, 1942, or for more than three months following the date of his entry, whichever is the later; or

". . . (7) He has, within the time prescribed and in the manner provided in Section 611.21, filed with the local board with which he is registered, or if he is not registered, with the local board having jurisdiction over the area in which he is located, an Alien's Application for Determination of Residence (Form 302), together with an Alien's Personal History and Statement (Form 304), and such application is either pending or has resulted in the issuance by the local board of an Alien's Certificate of Nonresidence (Form 303) which has not expired.

". . . (8) He is an individual designated by the Director of Selective Service as not required to present himself for and submit to registration; . . ."

* * * * * * *

"611.21 *What aliens may apply for a determination.* Any non-declarant alien who has entered or who hereafter enters the United States in a manner prescribed by its laws . . . may file with his local board, if he is registered, or with the local board where he is at the time located, if he is not registered, an Alien's Application for Determination of Residence (Form 302); *provided that such application is filed within three months after the date of his entry into the United States or within three months after persons of his age become liable for training and service by law, whichever is the later; and provided*

further, that such application is filed prior to induction. An Alien's Personal History and Statement (Form 304) must be filed with such application. (Italics added.)

"611.21-1 *Application filed after three months.* Any alien who has not complied with the provisions of Section 611.21 or Section 611.26* may file an Alien's Application for Determination of Residence (Form 302) and an Alien's Personal History and Statement (Form 304) with a local board for transmittal to the Director of Selective Service for consideration. [Added by Amdt. 307, effective June 27, 1945.]"

The Attorney General's Opinion

On October 11, 1940, in response to a query from the War Department, the Attorney General issued an interpretation of Section 2 of the Act—that requiring registration for ". . . every male citizen . . . and every male alien residing in the United States." The Attorney General stated it to be his opinion that these words included, among others, alien temporary visitors for business or pleasure.

39 Op. Atty. Gen. 504.

Opinion of the District Court

The District Court noted the Attorney General's opinion and the fact that it had been followed by the Selective Service authorities. Conceding that the words "residing in the United States" had previously enjoyed a well-settled meaning in the law, which "cannot . . . include a temporary visitor whose status negates the permanence commonly associated with the concept of residence", the Court nevertheless was of opinion that Congress, in this Act, "departed from the settled construction of 'residing' and rather intended it to be synonymous with 'physical presence.'"

* 611.26. Subsequent applications by aliens for a Determination of Residence.

The Opinion of the Circuit Court of Appeals

The opinion of the Court of Appeals for the Second Circuit rests squarely upon the Attorney General's Opinion that the 1940 Act required petitioner, a temporary visitor, to register. The Court held that in amending the Act during the week of Pearl Harbor,

> "It appears . . . that Congress intended that everyone who was subject to registration should also be liable for service * * * Congressional re-enactment of substantially the same phrase concerning residence in § 2, after it had been interpreted by the Attorney General, indicates Congressional approval of that interpretation."

Questions Presented

1. Whether Congress intended the registration, training and service provisions of the Selective Service Act (50 U. S. C. App. § 303(a)) to apply to alien temporary business visitors forced to remain in the United States during World War II solely because of lack of transportation to their homelands.

2. Whether an alien can, at one and the same time, be admitted to the United States solely as a non-resident, temporary business visitor for an expressly limited period by the Immigration and Naturalization Service, and be adjudged a resident of the United States subject to military service for the duration of World War II by the Selective Service authorities.

3. Whether the mere re-enactment of a Federal statute after its interpretation by the Attorney General, in the absence of any showing that Congress in its debates or

hearings on the re-enactment, was aware of or gave any consideration to such interpretation, requires a judicial finding of Congressional approval of such interpretation.

4. Whether the interpretation of the Attorney General and the Court below, determining that temporary business visitors admitted to this country only by virtue of Section 203 of the Immigration Act of 1924 were nevertheless residents of the United States within the meaning of Section 303(a) of the Selective Service Act of 1940, was a correct construction of the latter statute.

5. Whether the Selective Service Regulations exceeded the scope of the Act in undertaking to establish independent standards defining persons "residing in the United States", without reference to the non-resident status already given to alien temporary visitors by the United States Immigration and Naturalization Service.

6. Whether Selective Service Regulations Section 611.13 and 611.21 were invalid and unconstitutional as violating the due process clause of the Fifth Amendment, because the Director of Selective Service, in promulgating them, exceeded the powers delegated to him by the Act, or exercised his delegated powers arbitrarily and capriciously, without providing standards whereby the Local Boards, or aliens, could determine residence status.

7. Whether the repeal provisions of Section 316 of the Selective Service Act of 1940, as amended, removed any bar to Petitioner's eligibility for United States citizenship.

Reasons Relied on for Granting the Writ

1. The United States Court of Appeals for the Second Circuit has decided a question of substance and importance, relating to the construction of Section 303(a), Title 50, Appendix of the United States Code, which is in conflict with Section 203 of Title 8 of the United States Code, and which has not been, but should be, settled by this Court.

> Cf. *United States* v. *Rubinstein,* 166 F. (2d) 249, Cert. Denied —— U. S. ——, 92 L. Ed. 700;
> 56 Yale Law Journal, 258, 260-263;
> 36 American Journal of International Law, 359, 375.

Determination of the main issue herein by this Court will clarify the residence and citizenship status of a large number of neutral alien temporary visitors who executed Selective Service Form 301 during the recent war, under belief they had no other alternative.

2. The decision of the Court of Appeals for the Second Circuit in this case is in conflict with the decision of the United States Court of Appeals for the Ninth Circuit in *Hicks* v. *Asit Ranjan Ghosh* (148 F. (2d) 822), dismissing appeal from the District Court, Southern District of California (58 F. Supp. 851) on the issue here involved.

3. The Selective Service Regulations 611.13 and 611.21 exceeded the scope and authority of the Act, and in consequence were invalid and unconstitutional in that they deprived petitioner of due process of law in violation of the Fifth Amendment to the Constitution.

> (a) Deprivation of the right of a hearing and appeal on the fundamental issue of whether petitioner was a "resident", and therefore subject to the jurisdiction of the Selective Service Board, is a

violation of the due process clause of the Fifth Amendment.

Ex parte Ghosh, 58 F. Supp. 851, Appeal dismissed, 148 F. (2d) 822.

(b) Action by a Selective Service Local Board, drastically altering the residence status of an alien temporary visitor under the exclusive jurisdiction of another Federal agency, without a hearing, is violative of the constitutional guarantee of due process.

Ex parte Ghosh, supra.

4. The drafting of non-resident neutral aliens for military service, or their exemption only upon forfeiture of a substantial right, is contrary to the historical legislative policy of the United States and contrary to accepted principles of international law.

2 Stat. 132;
Civil War Act of 1863 (12 Stat. 731, Sec. 1);
Civil War Act of 1864 (13 Stat. 732);
Spanish-American War Draft Act of 1898 (30 Stat. 361, Ch. 187);
Selective Draft Act of 1917 (40 Stat. 126, Sec. 25);
Selective Service Act of 1948 (Ch. 625—Public Law 759);
1935 Treaty with Sweden (49 Stat. 3195);
IV Moore's Digest of International Law, pp. 50-52;
36 American Journal of International Law, 359, 375;
56 Yale Law Journal, 258, 262.

(a) In the absence of clear and unambiguous Congressional language, this policy should not be changed by administrative fiat.

Dow v. *United States,* 226 Fed. 145;
U. S. v. *Girouard,* 328 U. S. 60.

(b) The construction adopted below raises political questions of grave importance affecting our relations with foreign governments.

36 American Journal of International Law, 359-382;

56 Yale Law Journal, 258, 262;

The Charming Betsy, 6 U. S. 64.

(c) Review by certiorari is appropriate in cases affecting our relations with foreign governments.

Ex parte Lau Ow Bew (1891), 141 U. S. 583, 144 U. S. 47.

(d) In the recently-enacted Selective Service Act of 1948, Congress, by using the same language as in the 1940 Act, has again raised the fundamental issue presented by this case, but in an even broader application, which makes it highly desirable that the problem should be settled by this court (Selective Service Act of 1948, Ch. 625, Public Law 759, 80th Cong. 2nd Session, Section 4(a)).

In support of the foregoing grounds, petitioner submits herewith the accompanying brief setting forth in detail the pertinent facts and arguments bearing hereon.

Conclusion and Prayer

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit be granted.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of the Court Below

The opinion of the Court of Appeals for the Second Circuit is reported at 168 F (2d) 952 (June, 1948).

Jurisdiction

The jurisdiction of the Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. (Title 28, United States Code, Section 347(a)).

The judgment sought to be reviewed was entered by the United States Court of Appeals for the Second Circuit on the 30th of June, 1948 (R. 59).

Errors Below Relied Upon Here

I. The United States Circuit Court of Appeals erred in holding that Congress intended the registration, training and service provisions of the Selective Service Act to apply to alien temporary visitors forced to remain in the United States during World War II solely because transportation to their homelands was not available.

II. The United States Circuit Court of Appeals erred in adopting a construction of the words, "resident," and "residing in the United States," as used in the Act, which is in direct conflict with their previous clear legislative meaning.

III. The United States Circuit Court of Appeals erred in failing to hold that Selective Service Regulations Section 611, as applied to petitioner, were unconstitutional in that:

A. They exceeded the power delegated to the Director, by erecting independent standards defining persons "residing in the United States," without reference to the non-resident status already given to alien temporary visitors by the Immigration and Naturalization Service.

B. They deprived the petitioner of due process of law by failing to give petitioner a timely hearing and a determination of his resident status.

IV. The United States Circuit Court of Appeals erred in holding that, irrespective of the invalidity of these regulations, petitioner was a person "residing in the United States" for purposes of the Selective Service Act.

V. The United States Circuit Court of Appeals erred in holding that mere reenactment of a Federal statute after its interpretation by the Attorney General, in the absence of any showing that Congress, in its debates or hearings on the reenactment, was aware of or gave any consideration to such interpretation, requires a judicial finding of Congressional approval of such interpretation.

VI. The United States Circuit Court of Appeals erred in holding that the repeal provisions of Section 316 of the Selective Service Act did not remove petitioner's ineligibility for United States citizenship.

Summary of Argument

I. Congress did not intend the Selective Service Act of 1940 to apply to alien temporary business visitors forced to remain in the United States during World War II solely because transportation to their homelands was unavailable.

A. In 1940, when the debates on the Selective Service Act were in progress there was already a well-defined legislative meaning for the words, "resident," and "residing in the United States," as applied to aliens.

B. Historically, the United States has always opposed compulsory military service for foreign nationals owing no allegiance to this country.

II. Even assuming that Congress intended alien temporary visitors to register and serve, the Selective Service regulations exceeded the scope of the Act, and the action of the Selective Service Director and Local Board denied petitioner due process of law in violation of the Fifth Amendment.

A. The regulations denied petitioner a timely hearing and a determination of his resident status.

B. The regulations provided no standards by which the Local Board might determine whether petitioner was or was not "residing in the United States."

C. The regulations deprived petitioner of the temporary non-resident visitor's status previously given to him by determination of the Immigration and

Naturalization Service, pursuant to the exclusive jurisdiction over alien temporary visitors vested in that Service by our immigration laws.

D. The regulations purported to determine, arbitrarily and capriciously, that any male person who was physically present in the United States for a period of 90 days was, irrespective of any other factors, a person "residing in the United States."

E. The regulations denied petitioner any right to appeal from the Local Board's refusal of a hearing as to his residence status, even to the Civilian Appeal Board or to the President.

F. The action of the Local Board disregarded petitioner's specific claim to non-resident status.

G. The action of the Local Board compelled petitioner prematurely to make his election regarding Form 301.

III. In any event, petitioner's execution of Form 301 no longer operates as a bar to his becoming a citizen or a permanent resident of the United States.

IV. The mere re-enactment of a Federal statute, after its interpretation by the Attorney General, does not bar judicial re-examination of the construction adopted.

I.

Congress did not intend the registration, training and service provisions of the Selective Service Act to apply to alien temporary business visitors forced to remain in the United States during World War II solely because transportation to their homelands was not available.

Petitioner was and still is a citizen of Sweden, domiciled in Sweden, a partner in a Stockholm business firm, and temporarily in the United States solely for purposes of business. But for the physical unavailability of transportation back to Sweden during World War II, he would have returned to Stockholm in July of 1940, and would today enjoy the right given by our Immigration and Naturalization Laws to other citizens of Sweden to apply for entry into the United States for permanent residence and to become an American citizen. The judgment complained of deprives him of this right.

It similarly deprived many thousands of other neutral temporary business visitors of the same right.

This Court is urged to grant certiorari so that the issue thus presented, which has been raised anew by the passage of the Selective Service Act of 1948, may be settled before additional large numbers of persons are adversely affected by the construction adopted by the court below. It is pointed out that in this new statute, Congress has imposed liability for military service in the same language, pregnant with the same ambiguity, but has granted exemption from military service, upon the same forfeiture of American citizenship thereafter, not only to citizens of neutral countries, but to "any citizen of a foreign country who is not deferrable or exempt from training and service under the provisions of this title".

The issue presented herein is therefore both alive and of substantial importance today.

The nub of this case is the meaning intended by Congress in using the words "residing in the United States" in the Selective Service Act of 1940. The Circuit Court of Appeals below apparently felt that Congress, by reenacting substantially the same phrase in the Pearl Harbor amendment of December 20, 1941, fifteen months after the issuance of the Attorney General's opinion (39 Op. Atty. Gen. 504) thereby indicated its approval of that interpretation. The court's decision, stated simply, was that because petitioner was physically present in the United States when the Selective Service Act took effect, and for three months thereafter, he was subject to the Act as a person "residing in the United States." This decision seems demonstrably wrong.

This phrase necessarily separates all aliens into two groups: those *residing* in the United States and those *not residing* in the United States. Registration and military service were required only of the first group, but not of the second. Yet, under the construction adopted below, the only aliens *not residing* in the United States (irrespective of visas, temporary visitors' permits, or any other documents authorizing entry into this country) were those which the Director of Selective Service, personally, decided to label, in the regulations he promulgated, "non-residents."

A. In 1940 when the debates on the Selective Service Act were in progress there was a well-defined legislative meaning for the words "resident" and "residing in the United States" as applied to aliens.

The accepted, established meaning of these words, when applied to aliens (who have always been in a separate category under our federal statutes for purposes of determining residence) was an immigrant admitted to the United

States for permanent residence with intent to establish a domicile in this country.

> Immigration Act, Title 8, U. S. Code, §§ 100 et seq., 136 (d) (1), 203 (2), 452, 707, 801, 1001-1002;
>
> Nationality Code, Title 8, U. S. Code, §§ 501 et seq.;
>
> Alien Registration Act, Title 8, U. S. Code, §§ 451 et seq.;
>
> Alien Owner of Land Act, Title 8, U. S. Code, §§ 71-72;
>
> Exclusion of Chinese Act, Title 8, U. S. Code, §§ 261 et seq.

In *Delaware & Western Railway Company* v. *Petrowsky*, 250 Fed. 554 (C. C. A. N. Y., 1918) cert. den. 247 U. S. 508, the Court said:

> "'Residence' and 'domicile' are two perfectly distinct things, . . . but residence as used in statutes defining political rights is synonymous with domicile and denotes a permanent resident" (p. 560).

1. *Moreover, an alien temporary visitor possesses a unique status. He is never, under the immigration laws, from which he derives his sole right to enter this country, a "resident" of the United States.*

> *U. S.* v. *Frederick*, 50 F. Supp. 769, affd. 146 F. (2d) 488, cert. den. 324, U. S. 861 (1930).

Exclusive jurisdiction over the entry of aliens into the United States, the determination and classification of their status, the supervision of their stay and their deportation in appropriate cases, is vested in the Commissioner of Immigration and Naturalization. (Title 8, U. S. Code, §§ 102, 155, 454, 728, 740).

These statutes provide that "an immigrant is a person entering the United States for permanent residence" (8

U. S. Code, Sec. 203). A "non-immigrant" (8 U. S. Code, Sec. 203) is not a permanent resident; and a "temporary visitor" is a "non-immigrant" (8 U. S. Code, Sec. 203(2)).

The Commissioner of Immigration, in General Order 30, provided as follows:

> "An alien visiting the United States temporarily as a tourist or temporarily for business or pleasure, shall be construed to mean an alien coming to the United States to remain not more than six months."

Such an alien does not receive an "immigration visa"; he receives only a permit or certificate of temporary visit.

> *United States ex rel. Di Mieri* v. *Uhl* (C. C. A. 2, 1938), 98 F. (2d) 92.

A temporary visitor is subject to deportation if he fails to leave at the expiration of that period.

> *Marty* v. *Nagle* (C. C. A. 9, 1930), 44 F. (2d) 695, cert. den., 283 U. S. 868;
> *Metaxis* v. *Weedin* (C. C. A. 9, 1930, 44 F. (2d) 539.

Petitioner received, and at all times involved in this proceeding, possessed a valid, unexpired, non-resident temporary visitor's permit. This document alone gives legal status to his presence in the United States. Without it, he would be an alien illegally in this country. The Immigration and Naturalization Service is exclusively empowered by statute to determine which alien shall be admitted to the United States, or in what status or capacity, or how long they shall stay.

> *Collyer* v. *Skeffington*, 265 Fed. 17, Rev'd on other grounds 277 Fed. 129 (C. C. A. 1, 1922);
> *Low Wah Suey* v. *Backus*, 225 U. S. 460, 468;
> *Chryssikos* v. *Commissioner of Immigration* (C. C. A. 2, 1924), 3 F. (2d) 372, 373.

It alone, therefore, has authority to change his status, and he remains a temporary visitor within the exclusive jurisdiction of that agency until such time as he departs or is deported from the United States.

Del Castillo v. *Carr,* 100 F. (2d) 338 (C. C. A. 9, 1938);
United States ex rel. Sogolow v. *Karnuth,* (D. C. N. Y., 1928) 28 F. (2d) 281;
Chryssikos v. *Commissioner of Immigration, supra;*
Ex parte Menaregidis (D. C. N. Y., 1925) 13 F. (2d) 392.

Holding that an alien temporary visitor is not an "inhabitant" of the State of New York, Surrogate FOLEY said:

> "The distinction in the Century Dictionary of an 'inhabitant' from a 'transient visitor' accurately applies to the present case in view of the description of Patrick Cassidy in the passport as a 'temporary visitor.' Regardless of his present intentions to remain here, he is subject to the terms of his admission to this country and the power of the United States Government to deport him." *In re Gaffney's Estate,* 141 Misc. 453, 454 (1931).

The Immigration and Naturalization Service reviewed petitioner's intention (to return to Sweden as soon as civilian transportation was again available) and reconsidered his status every *six months* during the entire duration of the war. Every six months the Service made a new determination that his temporary visitor's status should be continued because of the exigencies of World War II.

2. *A "temporary visitor" is not a person "residing in the United States" for purposes of naturalization under the U. S. Nationality Code* (8 U. S. Code, Section 707).

The basic prerequisite for acquiring United States citizenship is a five-year period of residence within the United States. Such residence can be established in the United States only by an immigrant entering this country with the intent of establishing *permanent* residence, and cannot be established by a temporary visitor admitted under § 203(2) of Title 8, U. S. Code. Such residence has been defined as being synonymous with "domicile."

> *Petition of Wright* (D. C. Mich.) 42 F. Supp. 306;
> *United States* v. *Kreticos*, 40 F. (2d) 1020 (Ct. App. D. C., 1930);
> *United States* v. *Parisi*, 24 F. Supp. 414 (D. Ct. Md., 1938);
> *In re Pezzi*, 29 F. (2d) 999 (D. Ct. S. D. Tex., 1929);
> *In re Wieg*, 30 F. (2d) 418 (D. Ct. S. D. Tex., 1929);
> *Int'l Merc. Marine* v. *Elting*, 67 F. (2d) 886 (C. C. A. 2, 1933);
> *Petition of Oganesoff*, 20 F. (2d) 978 (D. Ct. S. D. Cal., 1927).

In short, petitioner's stay in the United States on a non-resident, temporary visitor's permit has not satisfied a single day of the "residence" requirement for becoming a United States citizen.

3. *A "temporary visitor" is not a person "residing in the United States" for purposes of naturalization under the World War II Military Service Act* (8 U. S. Code, Sections 1001-1002).

This World War II statute provided an incentive to resident aliens to serve by granting citizenship three months after enlistment or induction. It provided:

> ". . . any person not a citizen, regardless of age, who has served or hereafter serves honorably in the military or naval forces of the United States during the present war, *and who shall have been at the time*

> *of his enlistment or induction thereof a resident thereof* . . . may be naturalized . . . and no period of residence within the United States or any State shall be required . . ." (Italics added.)

"Resident", in this statute, means only an immigrant admitted for permanent residence under the Immigration Laws; a temporary visitor is ineligible.

> *Ex parte Fillibertie* (S. D. N. Y. 1945), 62 F. Supp. 744, 747-748.

If petitioner has not been a "resident" alien sufficient to qualify for naturalization, how could Congress have intended that he be "residing in the United States" for purposes of induction into the United States Armed Forces? To hold that an alien temporary visitor can be inducted as a resident, and then upon his petitioning under Title 8, U. S. Code § 1001-1002, be refused naturalization because he was not a resident, is to make this statute either meaningless or a trap for the unwary.

4. *Congress did not intend, in the Selective Service Act, either (a) to change this well-established legal meaning of the words "residing in the United States", or (b) to take away from the Immigration and Naturalization Service their exclusive jurisdiction over alien temporary visitors.*

Congress never intended to extend to an alien—with one hand—permission to visit the United States for a six months period (requiring him to post bond to insure departure) and to impose upon him—with the other hand—concurrent liability during the same six months period to serve in the United States Armed Forces for as long as five years.

If Congress had intended to give power to a Local Board to invade the jurisdiction of the Immigration and Naturalization Service and to nullify petitioner's tempo-

rary visitor's permit, surely such a drastic re-writing of administrative jurisdiction would have to be found in explicit language setting forth the criteria and standards by which the new determination should be made. There is no such Congressional language.

Ex parte Ghosh, 58 F. Supp. 851 (Cal., 1944) appeal dismissed, C. C. A. 9, 148 F. (2d) 822.

5. *Petitioner's dilemma in the United States was exactly similar to that of an American faced with military service in any foreign country; if he had served, he would have lost his citizenship* (Title 8, U S. Code, Section 801).

Petitioner found himself, on November 8, 1943, without any real alternative. To retain his Swedish citizenship, he was told he must give up any future right to apply for United States citizenship (by signing Form 301). This amounted to no choice whatsoever, since the German invasion of Norway physically prevented his return to Sweden. Nor could he avoid this choice by going to Canada or Mexico, or to any other country to which transportation was available: in another World War II statute, Congress provided that all persons who departed from the jurisdiction of the United States for the purpose of avoiding military service thereafter became ineligible for citizenship (Title 8, U. S. Code, Section 136, Subsection (d)(1)).

The heart of our argument is that Congress intended all neutral alien permanent residents of the United States to make this choice. They had established their domicile and enjoyed the privilege of making their home here; they must accept the correlative responsibilities, and, in the face of World War II, choose their country of allegiance.

But to force this choice on a temporary visitor was, we contend, never intended. It would create serious inequities. For example: each Local Board, under the Regulations, could make its own determination as to residence.

Consequently, if two visiting aliens entered the United States together, with exactly the same status, but happened to come before different Local Boards, one might be inducted and the other declared a non-resident.

Nor is that the only inequity. The consequence of executing Form 301, for a temporary visitor, is to bar him—not only from becoming a United States citizen—but even from the privilege of entering this country for permanent residence thereafter (8 U. S. Code, Section 213(c)).

A Swedish alien permanently residing in the United States, however, and enjoying the more favored status of a resident alien during the war, could with impunity refuse to serve in the Armed Forces of the United States, by executing Form 301, and although he would be barred thereafter from becoming a United States citizen, but that would be his only penalty. He could remain in this country for the rest of his life without interference. If he chose to go abroad, he would be entitled to a re-entry permit; but he could not become an American citizen.

This was, we contend, manifestly not the intent of Congress in the Selective Service Act. Congress never intended to penalize a casual visitor, caught here by wartime circumstances and unable to leave, to a greater degree than those aliens domiciled here who, in the face of a national emergency, decided to reject this country as their ultimate sovereign.

Finally when Congress used the phrase "residing in the United States," it was not employing the ultimate catch-all phrase. It used a limited term. If the intention had been that aliens *not residing* in the United States (but only here as visitors), should also be subject to military service, it would have been easy for Congress to have so stated—as, for example, "all male persons physically present within the territorial jurisdiction of the United States."

Under such a clause, all aliens within the reach of American law would have been subject to the Act. Congress could have accomplished this objective. It did not. It expressly limited military service to the smaller category—those male persons "residing in the United States."

The position taken by the Court below creates an additional inequity: Take an Argentine business man, entering the United States as a temporary visitor for business in 1940, and thereafter receiving extensions of his visitor's permit. When subsequently required by his Local Board to choose, as a neutral alien, between induction into the United States Army and signing Form 301, the Argentine could have refused with impunity to make any choice whatsoever. The next day he could have boarded a plane at La Guardia Field for his native Argentina, there to remain until the end of the war. That Argentine business man would today be legally eligible for permanent residence in the United States and, at the end of the requisite period of residence, for United States citizenship.

Petitioner was unable to leave the United States solely because of the physical unavailability of ship or plane transportation back to his own neutral Sweden. To say that Congress intended to leave the issue of whether neutral business visitors were to serve or not serve in the armed forces of the United States to the mere accident of availability of physical transportation is to impute legislative flippancy to Congress.

B. Historically, the United States has always opposed compulsory military service for foreign aliens having no allegiance to this country.

In statutes dating from the beginning of the 19th Century, Congress has shown an historical disinclination to require compulsory military service from foreign nationals.

Act 1802 (2 Stat. 132);
Civil War Act of 1863 (12 Stat. 731, Sec. 1);
Civil War Act of 1864 (13 Stat. 732);
Spanish-American War Draft Act of 1898 (30 Stat. 361, Ch. 187);
Selective Draft Act of 1917 (40 Stat. 126, Sec. 2.5);
Selective Service Act of 1948 (Ch. 625—Public Law 759, 1948).

The Selective Draft Act of 1917, a much criticized document (see *Drafting of Neutral Aliens by the United States*, by William Fitzhugh and Charles C. Hyde, 36 Am. J. Int. Law, p. 359), for the first time in our history, authorized the compulsory drafting of *declarant* aliens (those who had filed declaration of intention to become United States citizens) but expressed intention to exempt *non-declarant* aliens entirely.* Many non-declarant aliens were actually inducted under this statute, a consequence which caused repercussions vis-a-vis our foreign relations:

> "At the time of the Armistice, some 40,000 complaints, protests and requests had been filed at the Department of State by diplomatic representatives of various neutral countries.
>
> ". . . The fact is that the United States has never, in the face of foreign opposition, persisted in the attempt to draft non-declarant aliens; and on three occasions, in 1863, in 1917 and in 1940, following an attempt to draft declarant aliens, the statutory law was modified in order to make room for exemptions" 36 Am. J. Int. Law, 359, 375.

In the Selective Service Act of 1940, therefore, when Congress extended military liability beyond the 1917 act to non-declarant *resident* aliens, it went further than any statute in our history, introducing a wholly new concept of

* None of the cases under the 1917 act are helpful here: the status of "temporary visitor" was not created until the Immigration Act of 1924.

eligibility for service based on residence. Moreover, a study of the Congressional debates and reports totally fails to show any Congressional anxiety concerning the interpretation of the crucial words, "residing in the United States"; and when the Selective Service Act was amended after Pearl Harbor, in 1941, there was complete silence as to the effect or interpretation which these words had caused. The Dec. 20, 1941 amendment, introduced during the chaotic week after Pearl Harbor, was passed, after favorable committee reports, as a War Department emergency proposal for increasing our military manpower (Senate 2126, House of Rep. 6215). No definition of its intended scope appears anywhere in the Congressional hearings or reports. (See particularly 56 Yale L. J. 258, 260-263, criticizing sharply the interpretation and administrative action of the Selective Service Director on the precise issue herein involved.)

C. In its Treaty of 1933 with Sweden (49 Stat. 3195) the United States has recognized the International Law principle of reciprocity regarding compulsory military service for Nationals.

The treaty covers only persons having dual nationality:

> "Article I. A person possessing the nationality of both the High Contracting Parties who habitually resides in the territory of one of them and who is in fact most closely connected with that Party, shall be exempt from all military obligations in the territory of the other Party."

A fortiori, a person who possesses only Swedish citizenship, is "most closely connected" with Sweden, and as a mere temporary visitor owes no obligation to the United States, should be regarded as exempt from military service for the United States.

D. Judicial notice should be taken that, under Swedish Law, American business visitors in that country during the period of American neutrality in World War II (1939 to 1941) were entirely exempt from Swedish Military Service.

S. F. S. (Acts of Swedish Parliament) No. 443—June 30, 1936, "Värnpliktslag"—Law of Universal Military Service, Chapter 1, para. 1; Amended, S. F. S. No. 967—Dec. 30, 1941.

II

Even assuming that Congress intended alien temporary visitors to register and serve, the Selective Service regulations exceeded the scope of the act, and the action of the Selective Service Director and the Local Board denied petitioner due process of law in violation of the Fifth Amendment.

Particularly commended to the Court's consideration as on all fours with the present case is *Ex parte Asit Ranjan Ghosh* (D. Ct. S. D. Cal. 1944, 58 F. Supp. 851, appeal dismissed by the Circuit Court of Appeals, Ninth Circuit, 148 F. (2) 822).

Ghosh, a native-born Indian, entered the United States in 1940 as a student visitor, under section 204 of Title 8 of the United States Code, to do graduate work at the University of Southern California; registered under the Selective Service Act, and was classified 4C (citizen of a neutral country). After India became a co-belligerent, and thirteen months after his classification, Ghosh, possessing an unexpired student visitor's permit, asked his Local Board to determine whether or not he was liable for service as a person "residing in the United States." The Board twice declared him a non-resident, but subsequently, upon being

so directed by the State Director, reversed its previous determination on the ground that Ghosh, after four years here, had forfeited his non-resident status. Ghosh, inducted, brought habeas corpus.

The Court granted the writ and ordered Ghosh released from the army on the following grounds:

> A. The regulations provided no standards by which the Local Board might determine whether Ghosh was or was not "residing in the United States."
>
> B. The regulations deprived Ghosh of the temporary non-resident visitor's status previously given to him by determination of the Immigration and Naturalization Service, pursuant to the exclusive jurisdiction over alien temporary visitors vested in that service by our immigration laws.
>
> C. The regulations purport to determine, arbitrarily and capriciously, that any male person who was physically present in the United States for a period of 90 days was, irrespective of any other factors, a person "residing in the United States."

The language used by the District Court in its opinion is directly in point in the present case, and reaches a conclusion directly opposed to that reached by the Court below. It is respectfully contended that this Court should grant certiorari to resolve the conflict which has thus resulted (the Court of Appeals for the 9th Circuit dismissed the appeal in the *Ghosh* case, good cause appearing therefore, upon stipulation of counsel; nevertheless, the *Ghosh* case is indisputably the law in the Ninth Circuit today).

A. The regulations denied petitioner any right to appeal from the Local Board's refusal of a hearing as to his resident status, even to the Civilian Appeal Board or to the President (*Ex Parte Ghosh, supra*).

B. The action of the Local Board disregarded petitioner's specific claim of non-resident status.

C. The action of the Local Board compelled petitioner to prematurely make his election regarding Form 301.

Petitioner, under Section 3A of the Act, had the right, before being required to execute Form 301, to be adjudicated a resident, be classified 1A, be physically examined and found qualified for service, and be ordered to report for induction. On November 8, 1943, when he was put to the choice in this case, petitioner had not received any of these orders. This is important only because of the fact that petitioner had been rejected in 1939 for military service in his native Sweden because of "acute rheumatic fever" (R. 12, 31). This disease also disqualified applicants from American military service under the Selective Service Act. (See DSS Form 220, Revised, directing all examining physicians and Selective Service Boards to classify as 4F any registrant who suffered, among other things, from "acute rheumatic fever").

III

In any event, petitioner's execution of Form 301 no longer operates as a bar to his becoming a citizen or a permanent resident of the United States.

Assuming that petitioner become debarred, by virtue of executing Form 301, from becoming a citizen of the United States, there still remains the question of whether this disability continued forever or whether it died with the termination of the statute creating it.

In Section 316 of theAct, Congress terminated the entire Act, including Section 3(a), among others, on March 31, 1947, "except as to offenses committed prior to such act." It is contended that when Section 3(a) terminated, without exceptions or saving clauses, petitioner's ineligibility to citizenship died at the same moment.

The unqualified repeal or termination of a statute without a saving clause destroys all rights and liabilities dependent upon it.

U. S. v. *Reisinger,* 128 U. S. 398;
Duke Power Co. v. *S. C. Tax Comm.,* (C. C. A. 4, 1936), 81 Fed. (2d) 513, cert. den. 298 U. S. 669;
U. S. v. *Hark,* 320 U. S. 531;
Ewell v. *Daggs,* 108 U. S. 143.

IV

The mere reenactment of a Federal statute, after its interpretation by the Attorney General, does not bar judicial reexamination of the construction adopted.

In *Girouard* v. *U. S.*, 328 U. S. 60, 69-70, this Court, per DOUGLAS, *J.*, said (1945):

> "We are met with the argument that even though those cases were wrongly decided [U. S. v. Schwimmer; U. S. v. Macintosh and U. S. v. Bland, all in this Court], Congress has adopted the rule which they announced. The argument runs as follows: . . . when the Nationality Act of 1940 was passed, Congress reenacted the oath [of allegiance in naturalization proceedings] in its pre-existing form, though at the same time it made extensive changes in the requirements and procedure for naturalization. From this it is argued that Congress adopted and reenacted the rule of the Schwimmer, Macintosh and Bland cases . . .
>
> "We stated in *Helvering* v. *Hallock*, 309 U. S. 106, 119 . . . that 'It would require very persuasive circumstances enveloping Congressional silence to debar this Court from reexamining its own doctrines.' It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law. We do not think under the circumstances of this legislative history that we can properly place

> on the shoulders of Congress the burden of the Court's own error . . . The silence of Congress and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence of the rule in those cases."

A fortiori, of this Court can re-examine its own prior judicial determinations even after Congressional re-enactment—without more—of the words construed, how much more compelling is the need for this Court to re-examine a prior determination, not of this Court, not indeed of any judicial tribunal, but solely of the Attorney General? For be it remembered that the Attorney General's opinion, promulgated in October, 1940, under pressure of the growing national emergency, shows no evidence of any great study of the problem judged. Without citation of any authority, indeed without discussion of the conflicting elements of ambiguity or the consequences of the conclusion, that opinion baldly states a conclusion.

Concurrently with the issuance of the Attorney General's opinion, Congress enacted the World War II Naturalization Act (Title 8, U. S. Code § 1001-1002). The opinion was issued October 11, 1940. The Act became law on October 14, 1940. In the Act Congress gave specific inducement to aliens to serve in our armed forces by holding out to *resident* aliens only the right to immediate naturalization. Careful study of the problem by the Attorney General should have revealed the anomaly already discussed (pp. 26-7).

Congressional silence during the enactment of the Pearl Harbor Amendment of the Selective Service Act, therefore, does not bar this Court from reexamining the fundamental issue thus hurriedly decided.

Conclusion

The decision of the United States Court of Appeals for the Second Circuit involves important questions relating to the Constitution and to Federal statutes which have not been, but should be, settled by this Court. Federal questions have been decided in a way probably in conflict with a decision of the Court of Appeals for the Ninth Circuit, and which, under the Selective Service Act of 1948, will become increasingly vital to a large number of persons.

WHEREFORE, the petitioner prays that a writ of certiorari issue to review the judgment and decree of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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Counsel for Petitioner.

DAVID MACKAY,
SIDNEY A. DIAMOND,
ROBERT E. HERMAN,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 317

HANS LUDWIG BENZIAN,
Petitioner,

v.

SAUL GODWIN, Chairman, and IRVING J. HESS, LEONARD E. SCHWALBE, IRVING SABSEVITZ and CLIFFORD N. OWEN, Members of Local Board No. 65, Manhattan, City and State of New York, UNITED STATES SELECTIVE SERVICE SYSTEM,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS THE PETITION

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS THE PETITION

The Solicitor General, on behalf of the respondents, has moved the Court to dismiss the petition for certiorari on the ground that the cause has abated.

1. The motion is improper. Rule 7 of the Rules of the Supreme Court states:

> "No motion by respondent to dismiss a petition for writ of certiorari will be received. Objections to the jurisdiction of the court to grant writs of certiorari may be included in briefs in opposition to petitions therefor."

The cases cited by the Government provide no authority for this motion. All were concerned with motions to dismiss writs of certiorari, not petitions for the writ, or with motions to dismiss writs of error or appeal. The motion should be denied.

In the event that the Court elects to regard respondents' motion and memorandum of law in support thereof as a brief in opposition to the petition, albeit incorrectly labelled, petitioner respectfully submits this memorandum of law in reply to the claim that the cause has abated. In the further event that the Court holds the cause has not abated, and is prepared to consider the petition for a writ of certiorari on the merits, despite the Government's failure to serve and file a brief in opposition within the time and manner prescribed by the Rules, petitioner has no objection. We believe the issue raised herein is unique, and should be fully and fairly heard by the Court.

2. The Government contends that the services of respondents, as members of Local Board 65, Manhattan, City and State of New York, were terminated, along with the existence of the Board itself, in the spring of 1947; that no successors to respondents or to their authority or that of the Board have been created; and that this suit against respondents as members of the demised Local Board No. 65 must therefore be dismissed as abated. As will appear, the result of the Government's argument is that even if the Board's erroneous interpretation of law has wrongfully deprived petitioner of his right ever to become a citizen of the United States, petitioner has no remedy for that wrong, judicial or administrative. If petitioner cannot continue this action against respondents, there is no person or body against whom he can maintain any action to right the wrong committed.

We submit that procedural niceties do not require the perpetuation of this injustice, that the cases relied upon

by the Government do not require it, that the statute relied upon need not be interpreted to produce it, and that due process of law stands here as a bar to administrative wrong without judicial remedy. Moreover, we believe that the question of abatement, raised for the first time in this Court, although available to the Government in the District Court, should not be determined against petitioner at this stage without affording him an opportunity to argue the question fully before some Court, and that the presence of the question, which we believe to be wholly novel as well as important, provides rather an additional ground for granting certiorari than a ground upon which to deny it.

3. The Government cites the familiar doctrine that an action to compel or restrain official action cannot be continued against one who, *pendente lite,* has left the office, and can be maintained only against the successor-incumbent by way of substitution in the original action (8 U. S. C. § 780; Rule 25(d) of the Federal Rules of Civil Procedure), or by the commencement of a new proceeding. We do not believe the doctrine is applicable when the remedy sought —declaratory judgment—requires neither that official action be compelled or restrained, and when the abolition of the office itself bars continuance or renewal of the claim against a successor.

The rationale of the decisions cited by the Government was succinctly expressed by Mr. Justice STRONG in the leading case of *United States* v. *Boutwell,* 17 Wall. 604, involving a petition for a writ of mandamus to the Secretary of the Treasury:

> "The office of a writ of mandamus is to compel the performance of a duty resting upon the person to whom the writ is sent . . . If he be an officer and the duty be an official one, still the writ is aimed exclusively at him as a person, and he can be punished for disobedience. The writ does not reach the office. It cannot be directed to it. It is therefore

> in substance a personal action . . . Where the personal duty exists only so long as the office is held, the court cannot compel the defendant to perform it after his power to perform has ceased" (17 Wall. at 608).

Of the cases cited in the Government's brief, those involving applications for injunctions against action threatened by a federal or state officer were held to have abated on the ground that a respondent no longer holding his official position could no longer take the threatened official action. *Shaffer* v. *Howard*, 249 U. S. 200; *Ex Parte La Prade*, 289 U. S. 444; *Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28. The cases involving writs of mandamus or habeas corpus requiring the officer affirmatively to take official action were held to have abated on the ground that a respondent no longer holding his official position is powerless to perform an official act. *Le Crone* v. *McAdoo*, 253 U. S. 217; *U. S. ex rel. Bernardin* v. *Butterworth*, 169 U. S. 600; *U. S. ex rel. Claussen* v. *Curran*, 276 U. S. 590.

There is logic in holding that an action against an individual in his official capacity abates when his loss of that capacity renders him powerless to commit the act sought to be restrained or compelled. But that logic is lacking where relief can be effected without restraint or compulsion upon the former officer, and where the illegal and permanent disability imposed by his past action is otherwise beyond judicial remedy. Such is the situation presented by this action for a declaratory judgment. The judgment prayed for, declaring (a) that petitioner's purported registration under the Selective Service Act and his execution of Selective Service Form 301 were nullities, and (b) that Section 303(a) of Title 50, U. S. C. App. does not render petitioner ineligible for United States citizenship, will afford petitioner effective relief from his present disability. Judicial declaration, upon a complaint served upon respondents when they were qualified and acting in

their official capacities, that their official acts were nullities will effectively remove a continuing bar to petitioner's eligibility for United States citizenship and for permanent residence in the United States.

The gravamen of the complaint does not lie in future action threatened by respondents, nor does the effectiveness of the remedy depend upon action to be taken by them. Manifestly, rules of abatement reasoning that the loss of office deprives the respondent of the power to do what the petitioner fears or desires have no application where the action is not conditioned on respondents' power to do anything. Careful study has failed to uncover a single case holding that the doctrine of abatement applies where the relief sought is a declaratory judgment as to the validity of past acts.

4. We have said that the logical basis of the rule respecting abatement has no relevance for this action for declaratory judgment. If it be said that the rule rests not only on logic, but on some practical judgment that the responsibility for directing litigation defending official action should rest with the presently responsible officer, and not with his presently non-responsible predecessor, such practical considerations surely have no place when the office is abolished and there is and can be no incumbent. The action, begun while respondents held office, is defended in any event by the Attorney General.

Abatement has never been thought to destroy the underlying cause of action; it affects only the particular litigation. *Fix* v. *Philadelphia Barge Co.*, 290 U. S. 530. The Government's position is that the cause of action is destroyed where the office is abolished, although neither the logic nor any policy judgment embodied in the rule of abatement requires that result.

5. The provisions of the revival statute and of the Rule permitting substitution of the incumbent where the re-

spondent has left office (8 U. S. C. 780, Rule 25 (d) of the Federal Rules of Civil Procedure) are inapplicable to this case. If the Local Board of which respondents were members no longer exists, it is equally true, as the Government itself asserts, that no other persons or agency have succeeded to the functions of respondents or of their Board. There is consequently no successor who may be substituted under the statute or the Rule. It was for this reason that petitioner made no motion to substitute.

6. If, as the Government has argued below, petitioner's ineligibility for citizenship survives the repeal 50 U. S. C. App. § 316) of the Selective Service Act, (See 1 U. S. C., Supp. V., § 29), then, by the same token, the body imposing the disability must survive the repeal for the limited purpose of litigating the validity of its determination of disability. We do not believe that the language of Section 316 of Title 50 U. S. C. App., rendering "inoperative" the sections of the Selective Service Act providing for Local Boards (50 U. S. C. App. § 310), requires the conclusion that the Local Boards lack continued existence for the vestigial purpose of defending pending litigation regarding acts having continuing effect, and with respect to which no other judicial remedy is available. To construe Section 316 otherwise is, at the least, to raise serious doubts as to its constitutionality.

7. If the members of Local Board No. 65 no longer have any continuing official status, even for the purposes of this action for a declaratory judgment, petitioner is left in an impossible position. The Government does not suggest, and we do not believe, that there is anyone else whom the petitioner can sue to remove the continuing ineligibility for United States citizenship which he claims was wrongfully and unconstitutionally imposed upon him. Nor is this a circumstance which petitioner might have prevented by originally instituting his action against some other respond-

ent. Petitioner might perhaps have sued the Director of Selective Service (holding office under the Selective Service Act of 1940), but such a suit would be subject to precisely the same claim of abatement made here with respect to the Local Board.

The Government's claim here is constitutionally untenable because it is more than a plea in abatement. It is a claim that the abolition of the Local Board has destroyed the cause of action, and that petitioner is without any remedy whatsoever for a continuing wrong. It deprives petitioner of liberty and property without due process of law by destroying the right guaranteed by the Fifth Amendment to judicial review of an administrative determination depriving him of liberty and property. *Ng Fung Ho* v. *White*, 259 U. S. 276.

The Government's position, baldly stated, is that Congress may create an administrative board to determine questions of law, impose serious and continuing disabilities on the basis of such determinations, and then bar judicial review of those determinations by abolishing the agency which rendered them. This principle, we submit, offends reason, conscience, and the Fifth Amendment.

We need not argue here that due process requires that every administrative determination be subject to judicial review. *Ng Fung Ho* v. *White, supra*, holds that the Fifth Amendment imposes such a requirement with respect to deportation orders. We believe that the right to become a citizen of the United States stands no lower in this regard than the right to remain a resident of the United States. But even if that were not so, petitioner's case lies within the holding in *Ng Fung Ho*, since, as the complaint alleges, petitioner is subject to deportation if he is not eligible for citizenship. (R. 12; 8 U. S. C. § 213 (c); 8 U. S. C. § 224 (c)).

8. The Government expresses regret that the point of abatement was not taken at an earlier stage of this litiga-

tion. That the point was not earlier taken is indeed regrettable, but it has been held that delay in making the claim may bar the claim itself. *United States ex rel. Volpe* v. *Smith*, 289 U. S. 422 (1933), was a habeas corpus proceeding against the District Director of the Immigration Service in Chicago, brought by an alien arrested under an outstanding deportation order. While the proceeding was pending, the respondent was transferred, and a successor appointed. The objection that the suit had abated was not raised by the Government until the argument before this Court on certiorari. The Court disposed of the claim by remarking that

> "the cause was permitted to proceed without question, as instituted, long after Smith is said to have left Chicago; and the petitioner insists that no cause is shown for abatement. The point, we think lacks merit" (289 U. S. at 426).

Concededly, the respondent official in the *Volpe* case still occupied another post in the Department of Labor, from which he might conceivably have arranged the effectuation of the deportation order. But he no longer was District Director in Chicago, the position in which he was sued. Respondents here may no longer hold their positions, but a declaratory judgment against them will secure petitioner's rights as well as the writ directed against the former District Director.

The record of delay here is as impressive as in the *Volpe* case. After the termination of respondents' services as members of Local Board No. 65 on May 29, 1947, the Government permitted this cause to proceed for more than seventeen months, to be heard in the District Court on June 17, 1947, and in the Circuit Court of Appeals on June 30, 1948, without raising the point. It should not be permitted to raise it for the first time at this stage.

9. We urge that the Court should not hold that this action, determination of which will establish the substantive rights of many thousands of aliens situated as is petitioner, has now abated, and that petitioner is consequently left without remedy. We submit that the petition for certiorari should be granted.

Dated: New York, N. Y.
November 23, 1948.

Respectfully submitted,

DAVID MACKAY,
Counsel for Petitioner.

DAVID MACKAY,
SIDNEY A. DIAMOND,
ROBERT E. HERMAN,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 317

HANS LUDWIG BENZIAN, PETITIONER

v.

SAUL GODWIN, CHAIRMAN, AND IRVING J. HESS, LEONARD E. SCHWALBE, IRVING SABSEVITZ AND CLIFFORD N. OWEN, MEMBERS OF LOCAL BOARD NO. 65, MANHATTAN, CITY AND STATE OF NEW YORK, UNITED STATES SELECTIVE SERVICE SYSTEM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO DISMISS THE PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the respondents, moves that this Court dismiss the petition for a writ of certiorari on the ground that the cause has abated.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

NOVEMBER 1948.

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System, on May 29, 1947." (Appendix, *infra*, p. 8.)

There is no connecting link between the Local Boards created under the Selective Service Act of 1940, and those now in existence. The latter Boards were created under the Selective Service Act of 1948, Pub. 759, 80th Cong., 2nd sess., more than a year after the demise of the Boards under the 1940 Act, and are completely different from those Boards, having no authority to deal in any way with registrants under the Act of 1940. We have been informally advised that under the 1948 Act, there is no Local Board No. 65 in Manhattan, New York County. There is, however, a Local Board No. 65 established under that Act, which Board is located in Queens County. Moreover, of the five respondents named in this case, only two have been reappointed to serve under the Selective Service System established under the 1948 Act, and they are members of Local Board No. 17, Manhattan, New York County.

2. No other agency has succeeded to the functions of Local Board No. 65. We do not believe that the Act of March 31, 1947, Pub. L. No. 26, 80th Cong., 1st Sess., relating to liquidation of the Selective Service System, operates to keep the instant proceeding alive. That Act established an Office of Selective Service Records the first of whose functions was "to liquidate the Selective Service System, which liquidation shall be completed as rapidly as possible after March 31,

1947, but in any event not later than March 31, 1948 * * *" (Section 2 (a)), and provided for the transfer of "all property, records, and personnel of the Selective Service System" to the Office of Selective Service Records (Section 4).[2] Nothing in this Act even suggests that the Office of Selective Service Records was to assume any liability of the local Boards. But whatever the effect of that Act on the operation of the Selective Service System, the fact remains that all Local Board members, including those here involved, ceased to operate as such shortly thereafter.

Thus, even if this proceeding could have been continued under the Act of March 31, 1947, and someone could have been substituted for the local Board members, it is clear on the face of the record in this case that petitioner did not move to substitute anyone within six months, as required by 28 U. S. C. 780, and hence failed to prevent the suit from abating. Indeed, so far as appears from the record, petitioner has never made any such motion.

The fact that 28 U. S. C. 780 was omitted from the revised Title 28 of the United States Code (H. Rep. No. 308, 80th Cong., 1st sess. A. 239) does not aid petitioner, since the time for so moving had long since expired on September 1,

[2] With respect to the transfer of the functions of the Office of Selective Service Records to the new Selective Service System, see Sec. 10 (a) (4) of Pub. L. No. 759, 80th Cong., 2d sess.

1948, the date on which that revision became effective. Moreover, Section 780 was omitted from the revised Title 28 for the stated reason that the same ground is covered by Rules 25 and 81 of the Federal Rules of Civil Procedure. In this connection, it may be noted that while Rule 25 pertains only to the District Court, the cause was in the District Court for more than six months after respondents' service with the Selective Service System had terminated, without petitioner making any motion to substitute (R. 2). See also Rule 19 (4) of the Rules of this Court, making 28 U. S. C. 780 applicable to proceedings in this Court.

3. If the Court feels that the petition should not be dismissed on the ground that the cause has abated and that it should be considered on its merits, the Government requests that it be given an opportunity to file a further brief in reply to the petition.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

NOVEMBER 1948.

APPENDIX

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM,
1712 G STREET NORTHWEST,
Washington 25, D. C., October 27, 1948.

1-26-1

The Honorable THE ATTORNEY GENERAL

Subject: Benzian v. Sol Godwin, Chairman, Irving J. Hess, et al., Members of Local Board No. 65, New York County, New York. U. S. Supreme Court No. 317

MY DEAR MR. ATTORNEY GENERAL: Pursuant to a telephone request from your office, I enclose herewith a signed copy of Liquidation Order No. 1, issued by me on March 28, 1947 and a sample of the Certificate of Service which was issued to all local board members upon the termination of their service in such capacity. This certificate was issued by the Selective Service System and signed by the President of the United States, the Director and State Director of the Selective Service System and the Governor of the State in which uncompensated service was rendered during the existence and operations of the Selective Service System under the Selective Training and Service Act of 1940, as amended.

All local boards of the Selective Service System

established under the Selective Training and Service Act of 1940, as amended, were liquidated on or before May 30, 1947.

The members of Local Board No. 65, Manhattan, New York County, New York City, defendants in the above entitled action, received, individually, a Certificate of Service, terminating their services as members of such local board and the Selective Service System, on May 29, 1947.

Sincerely yours,

(S) LEWIS B. HERSHEY,
Director.

Enclosures.

U. S. GOVERNMENT PRINTING OFFICE: 1949